UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

S. Siegel

UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD LECARREAUX and LIGHTMAN DRUM COMPANY, INC.,

Defendants,

and

LIGHTMAN DRUM COMPANY, INC.,

Third-Party Plaintiff,

v.

AUTOCAR TRUCKS, et al.,

Third-Party Defendants.

Civ. No. 90-1672 (HLS)

O P I N I O N

Sarokin, District Judge

This action arises under the Comprehensive Environmental Response, Compensation & Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. § 9601, et seq. Plaintiff United States seeks partial summary judgment as to Defendants Edward Lecarreaux's and Lightman Drum Co.'s ("Lightman") liability for response costs, daily penalties, and punitive damages.

The following facts are undisputed.

Defendant Lecarreaux was president and a principal of the Duane Marine Salvage Corporation ("DMC"), incorporated in New York. He personally owns the site in Perth Amboy, New Jersey on which DMC is located. Plt. Brief, Exh. 1. As part of DMC's operations, hazardous substances -- including tank bottoms, oil sludge, waste oils, solvents, acids, alkali solution, and flammable liquids -- were accepted for treatment and storage at the site.

Defendant Lightman operated as a hauler under contract for various companies' wastes which were taken and delivered to the DMC site, again under contract. See Various Invoices, Plt. Brief, Exh. 7. Lightman understood that DMC would "accept paint sludge and other flammable toxic waste," Lightman Answers to Interrogatories, ¶7, Plt. Brief, Exh. 7, and Lightman delivered such wastes to DMC on behalf of various companies. Lightman has cross-claimed against some of these companies.

In August of 1979, DMC entered into a consent order to, inter alia, "excavate and remove all chemical materials which have leaked or spilled from containers of materials placed or stored at said facility [DMC]." City of Perth Amboy v. Duane Marine Corporation, No. C-3798-78, Consent Order (N.J. Super. Ct. Ch. Div. Aug. 1, 1979). Plt. Reply Brief, Exh. 4. On July 3, 1980, DMC came into compliance with the consent order

and received authorization from the Superior Court to continue operations. Lecarreaux Aff't, ¶ 6.

On July 7, 1980 a fire at the General Cable Company (a firm with no connection whatsoever to DMC) spread to the adjoining DMC site. Several DMC buildings as well as approximately two thousand 55-gallon drums were engulfed by the blaze. DMC ceased operations subsequent to the fire.[1]

Samples taken by the New Jersey Department of Environmental Protection (NJDEP) at DMC between September, 1980 and June, 1981 indicated that various containers remaining at the site contained a variety of hazardous substances, including benzene, phenol, polychlorinated biphenyls, and arsenic. In July, 1984, as a result of oil observed flowing into the Arthur Kill from several seeps on the edge of the site, the EPA initiated an Immediate Removal Action and took steps to secure the site. Feldstein Decl., ¶ 11; Administrative Record - Tab 1.0, EPA Action Memoranda. In November, 1984 the Department of Health and Human Services issued a memorandum to EPA stating that the site represented an immediate and imminent threat to human health due to the presence of on-site contaminants. Id., ¶ 10. EPA determined that the DMC site might present an imminent and

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1. It is unclear from the record whether the site was abandoned. Evidence submitted by the United States indicates that the drums and tanks were not being protected from the elements, that rainwater was accumulating in several drums and tanks, and that the facility was being vandalized. Plt. Reply Brief, Exh. 6. Lecarreaux offers no evidence to refute this, but does claim that he was locked out of the site by the New Jersey Department of Environmental Protection in the summer of 1981, Def. Aff't, ¶ 17, although that order is not submitted in the record.

substantial endangerment to the public health, welfare and the environment within the meaning of section 106(a) of CERCLA, 42 U.S.C. § 9606(a).[2]

Based upon that determination, in December, 1984 EPA issued Administrative Order, Index No. II-CERCLA-50102 to thirty-five responsible parties, including Lecarreaux. The Order required the affected parties to, inter alia, undertake immediate corrective actions at the DMC site, including the removal of containerized waste and obvious surface and soil contamination.[3]

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2. 42 U.S.C. § 9606(a) provides:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

3. A site inventory conducted by IT Corporation for the EPA in 1985 listed the following materials on site:

1. approximately 2260 drums of which approximately 1250 are empty. The drums contain caustics, barium, chromium, lead, cyanides, ignitable organics, and polychlorinated biphenyls (PCB's).
2. 24 tank trailers and tanks and 8 roll-off containers. The tanks and containers contain aromatic compounds, acetone, chlorinated solvents, cyanides, PCB's, caustics,

(continued...)

Subsequently, in March 1985, the EPA issued Administrative Order, Index No. II-CERCLA-50107, to twenty-two responsible parties, including Lightman. This Order required the affected parties to undertake immediate corrective actions at the DMC site in cooperation with the responsible parties who were already cleaning up the site under the prior Order.

The complying responsible parties completed their corrective actions in May, 1987. However, both Lecarreaux and Lightman refused to comply with the terms of the Administrative Orders. The EPA notified both Lecarreaux and Lightman that they would be considered "recalcitrant" parties because of their failure to participate in the work effort. Plt. Brief, Exh. 10.

Lecarreaux attended meetings regarding the cleanup and had testing done. Some materials were removed from the site at Duane Marine's expense. Lightman identified the generators whose wastes it transported to the DMC site. However, neither Lecarreaux nor Lightman are represented on the Duane Marine Steering Committee. The Committee is composed of complying responsible parties who have given the EPA written notice of commitment to perform the removal work and who have contributed to the cleanup effort.

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3. (...continued)
and oil and water.
3. 40 5-gallon containers of halogenated sludge, 30 gallons of inorganic acids, one pressurized cylinder, and 30 drums filled with paint cans.
4. approximately 2,500 square feet of soil contaminated with PCB's and lead.

Plt. Brief, Exhibit 9.

against Lecarreaux for contribution to the cleanup costs.[4] In January, 1991 the District Court of New Jersey granted plaintiffs summary judgment and found Lecarreaux liable for contribution. Duane Marine PRP Group v. Lecarreaux, No. 89-805 (MTB), slip op. (D.N.J. Jan. 18, 1991).

The United States has also incurred response costs in connection with the DMC site, and in 1989 commenced this action against Lecarreaux and Lightman to recover those response costs. The United States also seeks daily penalties and punitive damages.

Discussion

This court can only grant summary judgment if there are no genuine issues of material fact and, viewing the facts in the light most favorable to the non-moving party, the moving party will prevail as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 84 (3d Cir. 1987). Summary judgment has been used routinely to resolve liability issues under CERCLA Sections 106 and 107.[5]

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4. Defendant Lightman was not a party to this action.

5. See, e.g., T & E Industries, Inc. v. Safety Light Corp., 680 F. Supp. 696, 709 (D.N.J. 1988) (court granted summary judgment on liability without determining consistency with national contingency plan or necessity of costs); United States v. Carolina Transformer Co., Inc., 739 F. Supp. 1030 (E.D.N.C. 1989) (defendants found liable on partial summary judgment for response

(continued...)

I. Plaintiff's Motion for Partial Summary Judgment Against Lecarreaux with Regard to Liability for Response Costs

Plaintiff moves for summary judgment as to the liability of defendant Lecarreaux under Sections 107(a) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(g)(2).[6] Plaintiff claims that Lecarreaux, as owner and operator of DMC, a facility from which there was a release or threatened release of hazardous substances which caused the incurrence of response costs, is liable for costs of removal or remedial action incurred by the United States Government.

Lecarreaux has already been found liable for costs incurred to clean up the DMC site. Duane Marine PRP Group v. Lecarreaux, No. 89-805 (MTB), slip op. (D.N.J. Jan. 18, 1991). Plaintiff argues that under the doctrine of collateral estoppel, Lecarreaux is barred from relitigating the issue of his liability. In Duane Marine PRP Group, the Court found that: Lecarreaux was a "responsible party" under Section 107(a) of

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5. (...continued)
costs incurred and to be incurred and for punitive treble damages); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (upholding district court's grant of summary judgment).

6. 42 U.S.C. 9607(a) provides:

> [T]he owner and operator of . . . a facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . all costs of removal or remedial action incurred by the United States Government . . . .

Section 113(g)(2) fixes the statute of limitations for recovery of costs of removal or remedial actions.

CERCLA; that there was a release or threatened release of a hazardous substance from the site; that the statutory defenses to liability under Section 107(b) (Act of God, actions of third parties, or a combination of the two) were not applicable; and that the equitable defenses raised by Lecarreaux (unclean hands, estoppel, and waiver) did not apply to a determination of his liability. Id. at 2-3. Given the collateral estoppel effect of these previously litigated factual contentions, plaintiff argues that all that need be shown by the United States is that it has in fact incurred response costs. The record shows that the United States has incurred costs of at least $216,173.84. Plt. Brief, Exh. 11.

However, Lecarreaux contends that the doctrine of offensive collateral estoppel is inappropriate to this case. The cases cited by the United States, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322 (1979) and United States v. American Cyanamid, No. 89-0565P, slip op. (D.R.I. May 31, 1990) limit the doctrine in several significant ways, and defendant argues that these limitations apply in Lecarreaux's case.

First, because liability in Duane Marine PRP Group was resolved via summary judgment, Lecarreaux contends that he did not have a "full and fair opportunity to litigate." See Parklane, 439 U.S. at 328 (a "full and fair opportunity to litigate" is an important safeguard to protect a party against whom collateral estoppel is asserted). Second, Lecarreaux notes that offensive collateral estoppel is improper when "a plaintiff could easily

have joined in the earlier action." Id. at 331 (since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound if the defendant wins, allowing offensive collateral estoppel may lead to more litigation since a plaintiff will have nothing to lose by not intervening in an earlier action). According to defendant, the United States could have joined in the earlier litigation, and by not doing so, it followed a "wait and see" approach which should not be encouraged. Third, defendant argues that offensive collateral estoppel is unfair to the defendant when his incentive to defend in the second case is much greater than in the previously litigated case. Id. at 330 (collateral estoppel inappropriate where suit for small or nominal damages provides little incentive for vigorous defense, particularly if future suits unforeseeable). Here, the United States is attempting to retrieve from Lecarreaux response costs, daily penalties and treble damages. In Duane Marine PRP Group, the cleanup costs were to be divided among at least fifty responsible parties. Although Lecarreaux presents no evidence what that cleanup cost might be, Lecarreaux argues that his incentive in Duane Marine PRP Group was much weaker than in the present case.

The Court rejects Lecarreaux's arguments and concludes that collateral estoppel applies in this case. First, a summary judgment proceeding concludes that, as a matter of law, a trial is unnecessary and the result is mandated. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-251 (1986). At issue,

of course, is whether a summary judgment is a "full and fair opportunity to litigate." The Supreme Court in Montana v. United States, 440 U.S. 147, 154 (1979), recognized that parties must have had a full and fair opportunity to litigate before a court can apply collateral estoppel. This Court in General Development Corporation v. Binstein, 743 F. Supp. 1115, 1132 (D.N.J. 1990), cited the Montana decision and went on to discuss which conditions meet the "full and fair" requirements and are sufficient to apply collateral estoppel. First, there must be a final judgment on the merits, and second, the issue must have been actually litigated. Id. at 1133. In the case at hand both conditions are met. Lecarreaux's liability was determined in a summary judgment motion, and "summary judgment is a final judgment on the merits." Hubicki v. ACF Industries, 484 F.2d 519, 524 (3d Cir. 1973). Furthermore, Lecarreaux's liability was the very issue litigated in that action. Therefore Lecarreaux has had a "full and fair opportunity to litigate."

Second, defendant offers no evidence that the United States could "have easily joined" the earlier suit and instead adopted a "wait and see" attitude. The Ninth Circuit noted in Starker v. United States, 602 F.2d 1341, 1349-1350 (9th Cir. 1979) that it is "unclear from Parklane what type of 'ease' is relevant." In Starker the plaintiff was technically authorized by Fed. R. Civ. P. 20 to join a previous suit, but the present suit differed in many respects from the previous suit, and the court concluded that were numerous possible explanations for the

plaintiff wanting to try the suits separately. Therefore, the Court declined to assume that a litigant "adopted a "wait and see" attitude for the obvious purpose of eluding the binding force of an initial resolution of a simple issue."

In the present case, similar reasoning applies. The United States has goals different from those of the complying responsible parties. Not only is the United States seeking daily penalties and punitive damages, as well as response costs, but the United States also has other significant and separate interests. Congress enacted CERCLA "to provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment." Pub. L. No 96-510, Stat. 2767 (1980) (purpose clause). See United States v. Kramer, 757 F. Supp. 397, 421 (D.N.J. 1991) (motion by plaintiff to strike affirmative defenses in an action to recover response costs expended at landfill site). Thus, the United States, in bringing an action under CERCLA, is interested not only in compensation, but also with establishing liability, with promoting effective cleanups, with providing the means for emergency response, and, in general, with preventing harm to persons from the release of hazardous substances.

Further, this Court, in McLendon v. Continental Group, 660 F. Supp. 1553, 1564 (D.N.J. 1987), required that the defendant produce evidence that the plaintiffs' actions were motivated by a "wait and see" attitude. Lecarreaux has provided none. To the contrary, there is evidence that the United States

did not "wait and see." First, the United States commenced this action on August 3, 1989 by sending a demand letter to Lecarreaux. Plt. Brief, Exh. 12. The complying responsible parties filed their complaint against Lecarreaux on February 24, 1989. Plt. Brief, Exh. 13. Nearly two years later, that case was decided by summary judgment. Again nearly two years later, this similar action against Lecarreaux is subject to a motion for summary judgment. Second, this suit includes the defendant Lightman who was not a party in the first suit. It was reasonable for the United States to choose to litigate only one suit and to not intervene in Duane Marine PRP Group.

Third, Lecarreaux's claim of diminished incentive in Duane Marine PRP Group is not supported by any evidence in the record. The cost of cleanup by the complying responsible parties was in excess of $1.8 million dollars. Plt. Brief, Exh. 13 at 8. The complying responsible parties have sued Lecarreaux for that amount, for an equitable lien on the property, and for the costs of the suit. Id. at 9. Cases which have allowed a diminished incentive defense include Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965) (offensive estoppel denied where defendant did not appeal an adverse judgment for $35,000 and was later sued for over seven million dollars), and Hicks v. Quaker Oats Co., 662 F.2d 1158, 1171 (5th Cir. 1981) (offensive estoppel denied where: previous judgment was for $35,000 and subsequent action sought $400,000; there were numerous possible

future plaintiffs; and there were alternative grounds for decision (detrimental reliance)).

In the case at hand, the United States has sued Lecarreaux for response costs of approximately $216,000. The court concludes that the earlier suit for response costs in excess of $1.8 million dollars does not support a claim of diminished incentive in that action. But Lecarreaux asserts that a judgment as to liability represents the "whole shooting match," Def. Brief at 24, since a judgment of liability potentially exposes Lecarreaux to substantial penalties. For a variety of reasons the Court rejects this argument.

First, there still remains to be determined not only the size of any civil penalties or punitive damages, but even whether those awards can be assessed. Second, the Court notes that the amount sought in Duane Marine PRP Group was quite substantial. Thus, this case is not comparable to Berner, where the court allowed a diminished incentive defense in a subsequent action for approximately two-hundred times the original award. Furthermore, while the Hicks court did not apply collateral estoppel where the original award was less than one-tenth the amount sought in the subsequent action, Lecarreaux cannot rely on any of the conditioning circumstances cited in Hicks. Other than the United States, there were no other future possible plaintiffs, and there were no grounds for Lecarreaux's liability in Duane Marine PRP Group except Section 107(a).

Finally, it is useful to return to Parklane to determine how the Supreme Court views the diminished incentive argument. "If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable." Parklane, U.S. at 330. This Court has difficulty accepting an argument that a suit for $1.8 million dollars is "small or nominal." But even if that is so, Lecarreaux was on notice within six months of the Duane Marine PRP Group suit being commenced that the United States was taking action against him. Plt. Brief, Exh. 12. A future suit was definitely foreseeable.

For the above reasons, the Court rejects Lecarreaux's arguments against collateral estoppel. Lecarreaux is collaterally estopped from re-litigating his liability in this case. However, even if collateral estoppel did not apply, this court would similarly reject Lecarreaux's claimed statutory defenses. Lecarreaux does not contest the Government's claims as to his identity and relation to the hazardous substances released at DMC. Nor does he otherwise contest liability under the standards established in United States v. Kramer, 757 F. Supp. 397, 421 (D.N.J. 1991) citing United States v. Aceto Agricultural Chemicals, Corp., 872 F.2d 1373, 1378-79 (8th Cir. 1989). Lecarreaux does claim that he is not liable under the Act by virtue of the statutory defenses provided in Section 107(b). Section 107(b) provides:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can

> establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by -- (1) an act of God;
>
> (2) an act of War;
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> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omission of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing paragraphs.

Lecarreaux disclaims liability on the basis of paragraphs (1), (3), and (4) of Section 107(b). He contends: 1) that the fire, as an act of God, was the sole cause of the release; 2) that the actions of third parties not in a contractual relationship with him were the sole cause of the release despite his exercise of due care and his taking of precautions; or 3) that a combination of the two causes was the sole cause of the release.

Based on his assertion of these statutory defenses, Lecarreaux argues that issues of material fact preclude summary judgment, specifically that the undetermined cause of the fire is material to his affirmative defenses. Defendant argues that it is necessary for him to have an opportunity for discovery on this point. Lecarreaux's position is that the fire may be the sole

cause of the release or threatened release of hazardous substances at the DMC site.[7]

Alternatively, Lecarreaux asserts that the causes of the fire were the acts of third parties over which he had no control and that, despite his exercise of due care and his taking of precautions, there was nothing that could have prevented the release of hazardous substances. Lecarreaux asserts that he had no contractual connection with the General Cable Company, which is where the fire started. In addition, DMC employees were well-trained and prepared with fire extinguishers and sprinklers on hand, and DMC employees attempted to fight the fire until they were ordered off the site by the Perth Amboy Fire Chief. Further, DMC had obtained a "clean bill of health" from the NJDEP and the Superior Court of New Jersey just days before the fire, which, according to Lecarreaux, proves that he was operating his facility with due care.

However, the undisputed evidence before the Court belies Lecarreaux's claim that the release or threat of release

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7. There is some support for the legal argument that, in certain circumstances, summary judgment is inappropriate until cause is actually determined. For instance, in Sabine Towing and Transportation Co., Inc. v. United States, 666 F.2d 561, 562 (Ct. Cl. 1981), the Court of Claims denied a motion for summary judgment until such time as plaintiff could develop its defense by exploring the circumstances of a spill that resulted from plaintiff's vessel having struck an unknown underwater object. In addition, the Second Circuit has commented the "if the fire that precipitated the toxic spill was attributable to an act of God, [the plaintiff] would not be a 'responsible party.'" Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986) (agricultural chemical warehouse allegedly burned due to lightning).

was caused solely by one of the Section 107(b) causes. Given the requirements of Section 107(b), the question is not what was the cause of the fire, but whether the fire was the sole cause of the releases or threatened releases at the site. The United States alleges that "it is clear that the releases or threatened releases at the Site were the result of multiple causes not covered by Section 107(b)." Plt. Reply Brief, at 13. The Court recognizes that at this juncture, prior to discovery, it is impossible to determine whether Lecarreaux or his employees were at fault on the day of the fire. But those events are immaterial, since the record indicates that releases occurred several years after the fire. See, e.g., Plt. Reply Brief, Exh. 6(a)-(d). There is no evidence to support the argument that the post-fire spills are solely a result of the fire, while there is suggestion that no precautions were taken by DMC. For instance, the NJDEP Memo of March 5, 1982 discusses a spill from a trailer caused by freezing, Plt. Brief, Exh. 5; and the New Jersey Department of Law and Public Safety Letter of November 19, 1982 indicates further leakage of drums and trailers due to exposure to the elements. Plt. Reply Brief, Exh. 6.

Section 107(b) requires that Lecarreaux acted with due care and took precautions against foreseeable results as regards the acts or omissions of third parties. The legislative history of CERCLA describes due care as "all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts

and circumstances." H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. I at 34 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 6119, 6137. Even accepting Lecarreaux's allegations as true for purposes of this summary judgment motion, he offers no evidence of his due care or of any precautions taken to prevent the post-fire releases. Lecarreaux claims specifically that "[he] personally attended meetings, [that] voluminous testing was done, [and that] materials were in fact properly disposed of and/or removed from the Duane Marine Site at Duane Marine's expense . . . ." Def. Aff't, ¶ 16. But there is no evidence, suggestion, or argument that he took precautions to prevent further releases at the site.

Thus, based on the evidence before the court, Lecarreaux's Section 107(b) defenses do not apply. This Court therefore grants the United States summary judgment with liability against Lecarreaux.

II. Plaintiff's Motion for Partial Summary Judgment Against Lecarreaux with Regard to Penalties and Treble Damages

Plaintiff claims that Lecarreaux failed to comply with the Administrative Order issued by the EPA regarding the cleanup of the hazardous releases at the DMC site. Non-compliance can be in violation of Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1):

> Any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United

> States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues.

In addition, Section 107(c)(3), 42 U.S.C. § 9607(c)(3) provides:

> If a person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may by liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action.

The Defendant does not dispute that he failed to comply with the Order and that he failed to properly provide removal or remedial action pursuant to the Order. Nor does the Defendant dispute the fact that the United States has incurred costs as a result of the defendant's failure to take action.

Nonetheless, Lecarreaux presents three arguments against the imposition of penalties and damages. First, Lecarreaux claims that the United States' goal -- "to compel those respondents who receive administrative orders to perform the work required under the orders and [to] cooperate with other respondents who were performing the work," -- is "clearly inapplicable" to Lecarreaux's present circumstances because his lack of financial resources absolves him of the duty to comply with the Order. Def. Brief at 25. Second, Lecarreaux argues that the phrase "without sufficient cause" in both Sections 106(b)(1) and 107(c)(3) compels a finding that no civil penalties or punitive damages are appropriate in light of Lecarreaux's good

faith belief that he had a valid reason not to comply with the EPA's Administrative Order. Lecarreaux contends that he relied in good faith on his statutory defenses and his insolvency. Third, he claims that his "financial situation is relevant as an equity." Def. Brief, at 28. The legislative history of the Superfund Amendments and Reauthorization Act contemplates that courts will continue to interpret "sufficient cause" to encompass other situations where the equities require that no penalties or treble damages be assessed." Solid State Circuits, Inc. v. United States EPA, 812 F.2d 383, n.11, (8th Cir. 1987) (quoting H.R. Rep. 253(I) 99th cong., 2d Sess. 82, reprinted in 1986 U.S. Code Cong. and Admin. News 2835, 2864).

"Sufficient cause" is not defined in CERCLA. However, the legislative history describes sufficient cause as that which would encompass defenses such as the defense that the person who was the subject of the President's order was not the party responsible under the act for the release of the hazardous substance. See Wagner Electric Corp. v. Thomas, 612 F. Supp. 736, 745 (D. Kan. 1985) (quoting 1 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 at 770-771).

Following the guidance of the Wagner court, the Central District of California has held that "the phrase 'sufficient cause' should be interpreted to mean a 'good faith' defense . . . . Punitive damages may only be assessed where the Government proves that plaintiffs have refused to comply with the order in

bad faith." Aminoil v. United States, 646 F. Supp. 294, 299 (C.D. Cal. 1986) (bad faith would have been present if the defendants had challenged the order simply for the purpose of delay). A defendant's belief that she had sufficient cause not to comply with an EPA Order is to be evaluated on the objective evidence of the reasonableness and good faith of that belief. Solid State Circuits, Inc. v. U.S.E.P.A, 812 F.2d 383, 391 n.11 (8th Cir. 1987) (objectively reasonable standard for "sufficient cause" is constitutional) citing H.R. Rep. No 253(I) 99th Cong., 2d Sess. 82, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2864.

But given Lecarreaux's clear liability and his refusal to comply with the Administrative Order, the Court concludes that Lecarreaux's good faith defense is not objectively reasonable. First, despite Lecarreaux's contention that the fire was the sole cause of the releases, there is no evidence linking the fire to the post-fire releases, nor is there any evidence that defendant took precautions to prevent those subsequent releases.

Additionally, this Court is reluctant to find that financial status is a "sufficient cause" for failure to comply with the Administrative Order. Public policy demands that businesses be required to take into account their financial risks before dealing in hazardous materials. See United States v. Parsons, 723 F. Supp 757, 763 (N.D. Ga. 1989) (financial distress is not an excuse for failure to clean up a site). Further, Lecarreaux provides no evidence concerning his financial status beyond his lawyer's and his own claims of economic distress. His

affidavit vaguely asserts that he is "on the brink of insolvency." Lecarreaux Aff't, ¶ 7.

Finally, Lecarreaux's claim for consideration of the equities also fails. To return to the Solid State Circuits analysis cited by Lecarreaux, consideration of the equities is a limited defense:

> Given the importance of EPA orders to the success of the CERCLA program, courts should carefully scrutinize assertions of "sufficient cause" and accept such a defense only where a party can demonstrate by objective evidence the reasonableness and good faith of a challenge to an EPA order.

Solid State Circuits, Inc. v. United States EPA, 812 F.2d 383, n.11 (8th Cir. 1987) (quoting H.R. Rep. 253(I) 99th cong., 2d Sess. 82, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2864).

An instance where equitable considerations worked to prevent the application of punitive damages to a defendant who had not complied with an administrative order is the case of United States v. Parsons, 723 F. Supp 757 (N.D. Ga. 1989). There the EPA undertook completion of the cleanup before the defendant was allowed to comply with the order. The district court found that the government was not entitled to summary judgment on penalties. The district court held that, in this case, the defendant had an objectively reasonable, good faith belief for failing to comply with the order. The Parsons reasoning does not apply in Lecarreaux's case, however. Lecarreaux failed to comply with the order, not because the EPA preempted him, but because he

chose not to comply. Lecarreaux cannot demonstrate by objective evidence the reasonableness and good faith of his challenge to the EPA's order. Thus, Lecarreaux is liable for daily penalties and punitive damages.

III. Plaintiff's Motion for Partial Summary Judgment Against Lightman with Regard to Liability for Response Costs, Penalties, and Treble Damages

Plaintiff moves for summary judgment as to the liability of defendant Lightman under Sections 107(a) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a), 9613(g)(2).[8] Plaintiff alleges that Lightman, as a person who arranged for disposal or treatment of hazardous substances at DMC, and as a transporter of hazardous substances to DMC, is liable for costs of removal or remedial action incurred by the United States Government. Plaintiff further alleges that Lightman is liable

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8. 42 U.S.C. 9607(a) provides:

> [A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and . . . any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . all costs of removal or remedial action incurred by the United States Government . . . . [Emphasis added].

for daily civil penalties and punitive damages under Sections 106(b)(1) and 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606(b)(1), 9607(c)(3).

Defendant Lightman does not contest that, as a "person" who arranged for disposal or treatment of hazardous substances at DMC and as a transporter of hazardous substances to DMC, it is liable for response costs. It does argue, however, that the statutory defenses under Section 107(b) apply. First, it claims that "an act of God (the fire) was the sole cause of the release of hazardous substances at Duane Marine." Def. Brief, at 12. However, as discussed above, the cause of the fire is immaterial here. Releases occurred at DMC after the fire, and there is no evidence to suggest that those releases were caused solely by the fire.

Second, Lightman claims that "the acts or omissions of unknown responsible parties, cited by the EPA [in its Administrative Orders] were the cause of the release of hazardous substances." Id. at 15. According to Lightman, Lightman has no contractual relationship with these unknown responsible parties and therefore is not liable under Section 107(b)(3) of CERCLA.[9] In effect, this is a claim that Lecarreaux and DMC, although liable for the releases, did not cause those releases, since if Lecarreaux and DMC were partial causes, Lightman would be liable by virtue of its contract with DMC. Lightman's only submission in opposition to summary judgment is Lightman's bald assertion,

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9. See supra, page 10.

without exposition, that nobody with whom it had a contract caused the releases. Lightman Aff't, ¶¶ 6-9. Neither this Court, nor the court in Duane Marine PRP Group, has found explicitly that Lecarreaux did in fact cause those releases; the lack of evidence that Lecarreaux took any precautions to prevent post-fire releases, although suggestive, is not conclusive.

The Court must look to the facts adduced as evidence in order to resolve a summary judgment motion. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1985) (emphasis added). See Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) ("[non-moving party] must do more than simply show that there is some metaphysical doubt as to the material facts"). In this case, defendant presents no evidence that these non-contractually related parties were the sole cause of the releases. Nor is there any evidence offered that Lecarreaux and DMC did not cause the releases. Based on the absence of evidence that the releases were caused solely by third parties, the Court concludes that there is no "genuine factual issue" which would preclude summary judgment for plaintiff. Further, Defendant has not filed a Rule 56(f) motion to obtain "facts essential to justify the [defendant's] opposition" to this summary judgment motion. Fed.

R. Civ. P. 56(f). Under these circumstances the Court cannot certify that there is a genuine dispute as to whether the acts of unknown responsible parties were the sole cause of the release. Lightman had a contract with Lecarreaux and DMC. That, in conjunction with the previous discussion regarding Lecarreaux's liability, makes the third party defense inapplicable to Lightman.

Third, Lightman claims that it relied on DMC's assurances that "all wastes transported to the site were to be lawfully disposed." Id. at 15. However, the only valid defenses to a CERCLA Section 107 action are the enumerated defenses in the Section. United States v. Kramer, 757 F. Supp. 397, 410 (D.N.J. 1991). DMC's assurances do not absolve Lightman of liability.

Therefore, the Court concludes that Lightman is liable for response costs arising from the cleanup of the DMC site.

In addition, although Lightman makes no argument against the application of daily penalties and punitive damages, the court concludes that Lightman is not protected from penalties and damages under a defense of "sufficient cause." Even if Lightman believed in good faith that it was not liable for cleanup costs, and that therefore, it had "sufficient cause" to ignore the Administrative Order, Lightman has offered no evidence or suggestion that, given the clear language of Sections 107(a) and (b), such a belief was objectively reasonable. Lightman had a contract with DMC and had transported hazardous substances to DMC. Lightman acknowledges that Lecarreaux abandoned the site,

leaving approximately 3500 metal 55-gallon drums.[10] Def. Brief at 2. As discussed above, there is no evidence suggesting that the post-fire releases were solely attributable to an act of God or to the actions of unrelated third parties. Because a "good faith" defense which is rejected by the court is not sufficient cause for failure to comply with an Administrative Order, see Aminoil, Inc. v. United States EPA, 599 F. Supp. 69, 73 (C.D. Cal. 1984), Lightman is liable for daily penalties and punitive damages.

Conclusion

For the foregoing reasons, the Court concludes that Defendants Lecarreaux and Lightman are liable for response costs, daily civil penalties, and punitive damages. The matter will be referred to Magistrate Judge Hedges for a determination of the appropriate amounts.

H. LEE SAROKIN, U.S.D.J.

Date: July 30, 1991

Original to: Clerk, U.S. District Court

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10. The Court notes that this number is different from the figure determined by IT Corporation in its site appraisal for the EPA. Plt. Brief, Exh. 9. However, the Court is only concerned with the fact that a significant number of drums remained on the site, not with the exact number of drums.

Copies to: Ronald J. Hedges, U.S. Magistrate Judge

Casey Shpall, Esq.
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. 7611
Ben Franklin Station
Washington, D.C. 20044

Jeffrey Campisi, Esq.
SHARKEY & CAMPISI
188 Eagle Rock Avenue
P.O. Box 419
Roseland, N.J. 07068

Richard Kagan, Esq.
LEONARD & BUTLER
300 Lanidex Plaza
Parsippany, N.J. 07054

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD LECARREAUX and LIGHTMAN DRUM COMPANY, INC., Defendants, and LIGHTMAN DRUM COMPANY, INC., Third-Party Plaintiff, v. AUTOCAR TRUCKS, et al., Third-Party Defendants.	Civ. No. 90-1672 (HLS) O R D E R 7-31 91 FILED JUL 30 1991 AT 8:30 WILLIAM T. WALSH CLERK

This matter having come before the court upon the motion of plaintiff, the United States of America, for summary judgment as to defendants' Edward Lecarreaux and Lightman Drum Company, Inc.'s liability for response costs, daily penalties, and punitive damages; and the court having considered the submissions of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown;

IT IS this 30 day of July, 1991, hereby

ORDERED that plaintiff's motion for summary judgment as to defendants' Lecarreaux and Lightman's liability be and hereby is granted; and it is further

ORDERED that judgment be entered against defendants' Lecarreaux and Lightman as to liability; and it is further

ORDERED that this matter be referred to Magistrate Judge Hedges for a determination of the appropriate amounts of the judgments against defendants Lecarreaux and Lightman.

H. LEE SAROKIN, U.S.D.J.